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CASE NO. 84–1320

In The Supreme Court of the United States

OCTOBER TERM, 1984

JERRY D. RADFORD,

Petitioner,

v.

A.R. JAGO, Superintendent,
London Correctional Institution,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

WHETHER, CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, A STATE MAY PLACE THE BURDEN OF PROOF WITH RESPECT TO THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE UPON THE ACCUSED.

PARTIES

The respondent in this action is A.R. Jago in his capacity as Superintendent of the London Correctional Institution at London, Ohio. The petitioner is Jerry D. Radford.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. (1a)[1] The decision of the United States District Court for the Southern District of Ohio, Western Division, is unreported. (6a) The decision of the Ohio Court of Appeals for the Second Judicial District is also unreported. (14a).

JURISDICTION

The opinion of the United States Court of Appeals was entered on November 19, 1984. Jurisdiction is alleged by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1] All appendix references are to the appendix contained in the petition for writ of certiorari.

This case also involves Ohio Revised Code Section 2903.02 which provides:

> (A) No person shall purposely cause the death of another.

STATEMENT OF THE CASE

Petitioner Jerry D. Radford was indicted by the January, 1980 Term of the Greene County, Ohio, Grand Jury on one (1) count for the crime of aggravated murder in violation of Ohio Revised Code Section 2903.01. Petitioner entered a plea of not guilty and the cause came on for jury trial. The jury returned a verdict of guilty as to the lesser included offense of murder in violation of Ohio Revised Code Section 2903.02. Petitioner was thereupon sentenced to a term of fifteen (15) years to life imprisonment.

Petitioner perfected an appeal of said judgment to the Ohio Court of Appeals for the Second Judicial District. On November 10, 1981, the appellate court issued an opinion affirming the Common Pleas Court judgment. (14a) The Supreme Court of Ohio thereafter denied petitioner's motion for discretionary review.

Having exhausted his state court remedies, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Southern District of Ohio, Western Division. As the sole ground for relief petitioner alleged that he was denied due process when the Ohio trial court instructed the jury that the burden of persuasion as to the affirmative defense of self-defense was upon the accused by a preponderance of the evidence. On January

20, 1984, the district court issued an opinion denying petitioner's petition as without merit. (6a)

Petitioner perfected a timely appeal to the United States Court of Appeals for the Sixth Circuit. Subsequent to briefing, the appellate court determined that oral argument was not necessary and, on November 19, 1984, issued an unreported decision affirming the district court's judgment. (1a)

The facts underlying petitioner's murder conviction are straight forward. The prosecution presented evidence that petitioner had "fronted", i.e., transferred on credit, drugs to the victim Keith Harris. Harris was subsequently arrested on a drug charge and, as a result, either could not or would not pay petitioner. Two (2) days prior to the homicide, petitioner met with Harris and informed him that he would get his money one way or the other. Petitioner told a third party that he intended to kill Harris because of Harris' refusal to pay the drug debt. On the date of murder, Harris and others were "partying" at petitioner's house. During the course of the evening, Harris took a .38 caliber handgun out of his girlfriend's purse and asked petitioner if he had any ammunition for the weapon. Harris then placed the empty weapon back into his girlfriend's purse. Later that same evening, petitioner shot and killed Harris.

Petitioner chose to testify in his own behalf. Petitioner admitted that he intentionally shot the decedent twice at close range with a high powered handgun but claimed that he was justified in doing so because the decedent was "charging" him while carrying a weapon.

The difficulty with petitioner's testimony was two fold. Initially, petitioner had been present when the

deceased had removed the .38 caliber handgun from his girlfriend's purse and informed petitioner and others that he had no bullets for it. The deceased then placed the empty weapon back in his girlfriend's handbag. Moreover, the police were summoned immediately subsequent to the shooting. The investigating officers found the empty .38 caliber gun in the purse of the deceased's girlfriend. A thorough search of the premises did not result in the finding of any bullets. In sum, the deceased was unarmed when petitioner shot him and petitioner's testimony to the contrary was wholly destroyed by the unassailable physical evidence.

At the conclusion of petitioner's trial, the state trial judge gave the following jury instruction with respect to the issue of self-defense:

> The Defendant claims that what he did was justified on the basis of self defense. If a person is assaulted by another who apparently intends to kill or cause great bodily harm, the person assaulted is not required to retreat but may repel force with force and may kill his assailant if it reasonably appears to the Defendant to be necessary to do so.
>
> To constitute self defense there must have been on the part of the Defendant a careful use of his faculties and reasonable grounds to honestly believe there was an immediate danger to his person or his life. There must have been a sufficient act coupled with an apparent present ability to carry it out to cause the Defendant to reasonably believe that the other party intended to kill or to do him great bodily

harm and that the shooting was necessary to save himself from death or great bodily harm.

If the Defendant has reasonable grounds and an honest belief that he was in imminent danger of death or great bodily harm, then he was justified even though he was mistaken as to the existence of such danger.

A Defendant is not in a position to claim self defense if he sought trouble and armed with a dangerous weapon he provoked a fight, and did not attempt to avoid it.

If in the careful and proper use of his faculties, the defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the Defendant, then the Defendant having notice of his adversary's position was released from the danger, and the right to use force in self defense ended. If thereafter the Defendant continues to fight, he becomes the aggressor and a subsequent injury to another is unlawful.

The burden of proving the defense of self defense is upon the Defendant. He must establish such defense by a preponderance of the evidence.

Preponderance of the evidence is the greater weight of the evidence. That is, evidence that you believe because it outweighs or overbalances in your minds the evidence opposed to it.

A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity or the greater number of witnesses.

In determining whether or not an issue has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that issue regardless of who produced it.

If the weight of the evidence is equally balanced or if you are unable to determine which side of an issue has the preponderance, then the Defendant has not established such issue.

If the Defendant fails to establish the defense of self defense, the State must still prove all the elements of the crime charged by proof beyond a reasonable doubt.

If you find that the State proved beyond a reasonable doubt all the essential elements of the crime of aggravated murder

> or murder and that the Defendant failed to prove by a preponderance of the evidence the defense of self defense, your verdict must be guilty.
>
> If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the crime of aggravated murder or murder or if you find that the Defendant proved by a preponderance of the evidence the defense of self defense, then you must find the Defendant not guilty. [Tr. 588-592] [Emphasis added].

The foregoing charge is the standard self defense jury instruction which is given throughout the State of Ohio.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment does not mandate that a State assume the burden of negating an affirmative defense by proof beyond a reasonable doubt. A State may, consistent with the Due Process Clause, apply the common law rule which requires that a criminal defendant who interposes a confession and avoidance defense of excuse or justification demonstrate the existence of such an affirmative defense by a preponderance of the evidence.

ARGUMENT

A State May, Consistent With The Due Process Clause Of The Fourteenth Amendment, Require That A Criminal Defendant Demonstrate The Existence Of An Affirmative Defense By A Preponderance Of The Evidence.

The jury instruction challenged herein derives from the common law rule which termed an affirmative defense as a "confession and avoidance" technique which, despite proof beyond a reasonable doubt as to the crime charged, allowed for the return of a not guilty verdict based upon certain independent defenses predicated upon either "excuse" [duress, insanity, intoxication] or "justification" [self defense]. At common law, it was incumbent upon the accused to demonstrate the existence of such an "avoidance" technique by a preponderance of the evidence.

That Ohio has followed the common law view since its inception into statehood is demonstrated by the following language of the Supreme Court of Ohio in *State v. Poole,* 33 Ohio St. 18, 294 N.E. 2d 888 (1973):

> This Court has consistently recognized that there are certain "justification[s] for admitted conduct" allowed to a defendant in a criminal case, provable for the most part under the plea of not guilty, which are referred to as "affirmative defenses." As characterized by one authority, they represent not a mere denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged, but, rather,

> they represent a substantive or independent matter "which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true." Among those defenses, in Ohio, are self defense, duress, insanity, and intoxication. Affirmative defenses must be proved by a preponderance of the evidence.
> 33 Ohio St. 2d at 19.

Petitioner alleges that the jury instruction as to self defense was constitutionally infirm for the following two reasons: (1) self defense negates the element of purpose; and (2) all states must, as a matter of constitutional imperative, choose to disprove self defense beyond a reasonable doubt as a matter of substantive due process. Neither assertion is meritorious.

Petitioner was convicted of murder which is defined by Ohio Revised Code Section 2903.02 as follows:

> No person shall purposely cause the death of another.

In the instant case, petitioner admitted that he "caused the death" of the decedent and further admitted that he did so "purposely." Even had petitioner not made such admission, the jury could "rationally" have found that firing two (2) rounds from a magnum pistol into the body of the decedent at close range constituted a purposeful or intentional killing.

The gist of petitioner's argument is based on the following syllogism — if one fires in self defense, it is

logically inconsistent to find that such person intended to purposely kill his attacker. Common sense alone demonstrates the fallacy of petitioner's argument. If, for instance, an individual is attacked by a much larger and stronger person who is armed with a knife and has announced his intention to commit mayhem, any rational person would intentionally and purposely kill the attacker.[2] While such hypothetical person would, quite literally, be guilty of murder as he "purposely caused the death of another," the confession and avoidance device of self defense would allow for nonpunishment of the crime *if* the individual could demonstrate that he more likely than not was justified under a reasonable man standard.

Petitioner's argument is essentially grounded upon a *Mullaney v. Wilbur,* 421 U.S. 684 (1975) analysis, i.e., petitioner asserts that "absence of self defense" is an "element" of murder and that the state may not therefore "shift the burden of proof" to the accused. The United States Court of Appeals for the Sixth Circuit has repeatedly rejected such argument. See e.g., *Carter v. Jago,* 637 F. 2d 449, 452-457 (6th Cir. 1980); *Nieb v. Jago,* 695 F. 2d 228, 231 (6th Cir. 1982); *Jones v. Jago,* 710 F. 2d 45, 47 (6th Cir. 1982); *Thomas v. Arn,* 704 F. 2d 865, 872-878 (6th Cir. 1983); *Long v. McKeen,* 722 F. 2d 286, 289 (6th Cir. 1983). See also *Engle v. Isaac,* 456 U.S. 107, 136 (1982) [Justice Stevens concurring]. The Ohio courts are in full accord. See *State v. Davis,* 8 Ohio App. 3d 205, 456 N.E. 2d 1256 (1982); *State v. Snowden,* 7 Ohio App. 3d 358, 455 N.E. 2d 1058 (1982); *State v. Morris,* 8 Ohio App. 3d 12, 455 N.E. 2d 1352 (1982); *State v. Howze,* 66 Ohio App. 2d 41, 420 N.E. 2d 131 (1979).

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[2] This, of course, presupposes that an alternate course of action, e.g., escape, is unavailable.

Petitioner finally contends that the Due Process Clause of the Fourteenth Amendment mandates as a matter of substantive due process that all jurisdictions make affirmative defenses a "quasi-element" of criminal offenses and thereby require that the prosecution "disprove" such defenses beyond a reasonable doubt. Petitioner thus desires to constitutionally interject an "element" to homicide prosecutions which the Ohio legislature has expressly rejected. Aside from the obvious fact that our system of federalism does not allow the federal judiciary to rewrite state criminal statutes, this Court has consistently recognized that "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required" and the Court has thus declined" . . . to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused." *Patterson v. New York,* 432 U.S. 197, 210 (1977).

This Court has only recently declined to review precisely the question presented herein, *Moran v. Ohio,* _____U.S._____, 105 S. Ct. 350 (1984) [Brennen, J. dissenting from the denial of certiorari]. Absent a demonstrable change in circumstances, certiorari should likewise be denied in the instant controversy.

CONCLUSION

For the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requite number of copies of the foregoing Respondent's Brief in Opposition to Petition have been served on petitioner, Jerry D. Radford, by forwarding such copies through the office of his counsel, Steven Michael Cox, Attorney at Law, Suite 380 Talbott Tower, 131 North Ludlow Street, Dayton, Ohio 45402, by United States Mail, postpaid, this _____ day of May, 1985. I further certify that all parties required to be served have been so served. Petitioner's address is the London Correctional Institution at London, Ohio.

RICHARD DAVID DRAKE
Assistant Attorney General